PETRONAS DAGANGAN BHD v. KARAMUNTING DEVELOPMENT SDN BHD

COURT OF APPEAL, PUTRAJAYA
VARGHESE GEORGE JCA
VERNON ONG LAM KIAT JCA
ZAMANI A RAHIM JCA
[CIVIL APPEAL NO: S-02-198-01-2014]
18 MARCH 2016

LAND LAW: *Trespass – Encroachment on land – Subdivision of lots – 'Road reserve' – Title to road reserve issued in respondent's name – Ingress and egress to part of road reserve by owners of subdivided lots – Whether amounted to trespass – Whether action for trespass maintainable – Whether access to road reserve lawful – Whether 'ownership' of respondent subject to rights of other subdivided lot owners – Whether permission could be dispensed with*

The defendant ('respondent') owned a parcel of land in Sandakan held under Town Lease ('TL') No. 075311821 ('master title'). Subsequently, the respondent applied to subdivide the master title into commercial lots and a cinema lot. The respondent was successful and separate titled lots were issued to the respondent, which included, *inter alia*, a subdivided TL No: 077544186 ('cinema subdivided lot') and a single separate TL No: 077540491 encompassing within it all the road reserves (collectively referred as to 'road reserve'). Part of the cinema subdivided lot was subsequently acquired by the plaintiff ('appellant'). The cinema subdivided lot was further subdivided into TL No: 07757936. The appellant then obtained approval to develop the appellant's part of TL No. 077579376 into a petrol service station with direct ingress and egress to parts of the road reserve. After a sequence of demands, the respondent threatened to fence up all access through the road reserve to the petrol service station on TL No: 07757936 *ie*, part of the cinema lot. Hence, the appellant filed an action at the High Court, for a declaration that they were entitled to the use and enjoyment of the access over a road reserve from their petrol service station to the public highway at Jalan Bokara. The appellant also obtained an injunction to restrain the respondent from obstructing or preventing the use of the right of way over and along the road reserve and an order to remove any fencing or other obstruction as may be put up by the respondent to deny that right. The respondent contested the appellant's suit and filed a counterclaim seeking, *inter alia*, a declaration that the land within the road reserve was lawfully alienated to them as private property and that the appellant had committed, amongst others, trespass. However, the appellant withdrew its action as the appellant had obtained from the land office a right of way over the road reserve to the petrol station. Hence, only the respondent's counterclaim remained for disposal at trial. The High Court

A Judge allowed the respondent's counterclaim. Hence, the present appeal. The issues that arose for determination, *inter alia*, were (i) notwithstanding that the title to the road reserve (TL No: 077540491) had been issued in the name and held by the respondent, whether such 'ownership' was subject to the rights of the subdivided lot owners (inclusive of the appellant) on equitable
B grounds; (ii) whether the appellant had committed trespass over the said road reserve land; and (iii) whether the appellant had a right to use part of the road reserve as access to their subdivided lot.

Held (allowing appeal with costs)
Per Varghese George JCA delivering the judgment of the court:

C
(1) The trial judge embarked upon a wrong approach to decide whether there had been any trespass. The trial judge held that there ought to have been a change of usage of the land from cinema to petrol station before any construction of the petrol station could take place and upon such failure, s. 59 of the Land Ordinance (Sabah) (Cap 68) had been violated
D by the appellant. This weighed heavily upon the trial judge's mind in finding that there had been a 'trespass' committed by the appellant over the road reserve. The consideration or question dealt with by the trial judge in that manner was wholly irrelevant to the issue at hand before the court. (paras 17-20)

E
(2) The Land Ordinance (Sabah) (Cap 68) was not modelled on the Torrens System of land registration as it did not have any provision conferring indefeasibility of title or interest, upon registration of the land comprised in the document of title issued in one's name. Therefore, the respondent could not assert sole and absolute right to deal with the road
F reserve land purely on the fact that the respondent's name was registered as owner of the TL No: 077540491 for all of the land comprised in the road reserve. (paras 30 & 32)

(3) Under the Land Ordinance (Sabah) (Cap 68), there was no equivalent provision in law as was found in s. 136 of the National Land Code
G ('NLC'). Notwithstanding that, the respondent could not act 'willy-nilly' and disregard the rights and interest of the owner or owners of the subdivided lots to a proper access to the main road. By the very layout of the area comprised in TL No: 077540491, it was obvious that the road reserve land was carved out to benefit the owners of the subdivided
H lots, including the appellant, with a proper access or right of way to the nearest main road, the Jalan Bokara. (paras 33 & 34)

(4) The rights or interest of the present or contingent owners of the subdivided lots contiguous to the road reserve (TL No: 077540491) amounted to equitable rights and interest which the respondent was
I obliged to honour without imposition of any payment or other terms and conditions to be complied with by such subdivided lots' owners as a

precondition for the use or reuse of the road reserve land. Equitable considerations in respect of the determination of rights and administration of matters affecting land was part of the law of the State of Sabah. Therefore, on equitable grounds, the appellant had the right of access or right of way to the main road *via* the road reserve land. (paras 35, 36 & 37)

(5) The issue of TL No: 077540491 and the registration of the said title document in the respondent's name was merely a convenient administrative step adopted by the relevant land authority pending either, the approval of right of way upon application by individual owners of the subdivided lots under s. 31(1)(d) of the Land Ordinance (Sabah) (Cap 68) read together with the Land Rules of the State, or the formal taking over of the road reserve lands by the local authority. As such, the issue or registration of the title document did not vest in the respondent an absolute or exclusive right to deal freely with that road reserve land comprised in TL No: 075540491. Therefore, there was no trespass committed by the appellant. (paras 39 & 46)

(6) The trial judge had misdirected himself on the law when he held that there was 'trespass' by the appellant of the road reserve encompassed within TL No: 077540491. The appellant clearly had equitable rights to pass and repass the road reserve or such part thereof as rightful access to and from the main road. This right had been affirmed, without imposition of any condition as to payment or otherwise, by the Assistant Director of Land and Survey in the decision which granted the appellant the right of way through the road reserve to the main road. (para 46)

Bahasa Malaysia *Headnotes*

Defendan ('responden') memiliki sebidang tanah di Sandakan dipegang di bawah Pajakan Bandar ('PB') No. 075311821 ('hak milik induk'). Berikutnya, responden memohon untuk memecah bahagi hak milik induk kepada lot-lot komersil dan lot pawagam. Responden berjaya dan lot hak milik berasingan dikeluarkan kepada responden, yang merangkumi, antara lain, PB No: 077544186 yang dipecah bahagi ('pawagam lot dipecah bahagi') dan satu PB No: 077540491 berasingan merangkumi semua rizab jalan (dirujuk secara kolektif sebagai 'rizab jalan'). Sebahagian daripada pawagam yang dipecah bahagi kemudiannya diperolehi oleh plaintif ('perayu'). Pawagam yang lotnya dipecah bahagi selanjutnya dipecah bahagi kepada PB No: 07757936. Perayu kemudian memperoleh kelulusan untuk membangunkan bahagian perayu di PB No. 077579376 kepada stesen minyak dengan kemasukan dan keluar langsung ke bahagian rizab jalan. Selepas permintaan berturutan, responden mengancam untuk memagar kesemua akses melalui rizab jalan ke stesen minyak di PB No: 07757936 iaitu sebahagian lot pawagam. Oleh itu, perayu memfailkan tindakan di Mahkamah Tinggi, untuk deklarasi bahawa mereka berhak kepada

penggunaan dan kenikmatan akses rizab jalan dari stesen minyak mereka ke lebuh raya awam di Jalan Bokara. Perayu turut memperoleh perintah injunksi bagi mengekang responden daripada menghalang atau mencegah penggunaan hak jalan atas dan di sepanjang rizab jalan dan perintah untuk menanggalkan mana-mana pagar atau halangan lain sebagaimana yang dikemukakan oleh responden untuk menafikan hak tersebut. Responden menyangkal guaman perayu dan memfailkan tuntutan balas memohon, antara lain, deklarasi bahawa tanah dalam rizab jalan diberi milik menurut undang-undang kepada mereka sebagai harta persendirian dan bahawa perayu telah melakukan, antara lain, pencerobohan. Walau bagaimanapun, perayu menarik balik tindakannya kerana perayu memperoleh dari pejabat tanah hak laluan terhadap rizab jalan ke stesen minyak. Maka, hanya tuntutan balas responden yang tinggal untuk dilupuskan. Hakim Mahkamah Tinggi membenarkan tuntutan balas responden. Oleh itu, rayuan ini. Isu-isu yang berbangkit untuk penentuan, antara lain, ialah (i) walaupun hak milik kepada rizab jalan (PB No: 077540491) dikeluarkan atas nama dan dipegang oleh responden, sama ada milikan itu tertakluk kepada hak pemilik-pemilik lot yang dipecah bahagi (termasuk perayu) atas alasan-alasan ekuiti; (ii) sama ada perayu melakukan pencerobohan atas tanah rizab jalan tersebut; dan (iii) sama ada perayu mempunyai hak untuk menggunakan sebahagian rizab jalan sebagai akses kepada lot mereka yang dipecah bahagi.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Varghese George HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara memulakan pendekatan salah dalam memutuskan sama ada terdapat mana-mana pencerobohan. Hakim bicara memutuskan bahawa sepatutnya terdapat suatu perubahan dalam penggunaan tanah daripada pawagam kepada stesen minyak sebelum apa-apa stesen minyak dibina dan atas kegagalan tersebut, s. 59 Ordinan Tanah (Sabah) (Bab 68) telah dicabuli oleh perayu. Ini memberi kesan buruk terhadap pertimbangan hakim bicara dalam mendapati pencerobohan dilakukan oleh perayu terhadap rizab jalan. Pertimbangan atau persoalan dibicarakan oleh hakim bicara dengan cara tersebut adalah keseluruhannya tidak relevan dengan isu yang diketengahkan di mahkamah.

(2) Ordinan Tanah (Sabah) (Bab 68) tidak mencerminkan pendaftaran tanah Sistem Torrens kerana ia tidak mempunyai apa-apa peruntukan yang memberikan hak milik atau kepentingan yang tidak boleh disangkal semasa pendaftaran tanah yang terkandung dalam dokumen hak milik dikeluarkan atas nama seseorang. Lantarannya, responden tidak boleh menuntut hak mutlak untuk berurusan dengan tanah rizab jalan hanya atas fakta bahawa nama responden didaftarkan sebagai pemilik PB No: 077540491 untuk semua tanah yang terkandung dalam rizab jalan.

(3) Di bawah Ordinan Tanah (Sabah) (Bab 68), tiada peruntukan undang-undang setara seperti yang terkandung dalam s. 136 Kanun Tanah Negara. Walaupun sebegitu, responden tidak boleh bertindak 'willy-nilly' dan mengabaikan hak dan kepentingan pemilik atau pemilik-pemilik lot yang dipecah bahagi untuk akses yang betul ke jalan utama. Dengan susun atur kawasan yang terkandung dalam PB No: 077540491, jelas bahawa tanah rizab jalan dibentuk untuk memberi manfaat kepada pemilik-pemilik lot yang dipecah bahagi, termasuk perayu, dengan akses yang betul atau hak laluan kepada jalan utama terdekat, Jalan Bokara.

(4) Hak atau kepentingan pemilik terkini atau kontinjen lot yang dipecah bahagi bersempadan dengan rizab jalan (PB No: 077.540.491) berjumlah kepada hak saksama dan kepentingan yang mana responden berkewajipan untuk menghormati tanpa pengenaan apa-apa bayaran atau lain-lain terma dan syarat yang perlu dipatuhi oleh pemilik-pemilik lot bahagian yang dipecahkan sebagai prasyarat bagi penggunaan atau penggunaan semula tanah rizab jalan. Pertimbangan saksama berkenaan penetapan hak-hak dan pentadbiran terhadap perkara yang berkaitan tanah adalah sebahagian daripada undang-undang Negeri Sabah. Oleh itu, atas alasan saksama, perayu mempunyai hak akses atau hak laluan ke jalan utama melalui tanah rizab jalan.

(5) Pengeluaran PB No: 077.540.491 dan pendaftaran dokumen hak milik atas nama responden adalah langkah pentadbiran semata-mata yang mudah diterima pakai oleh pihak berkuasa tanah relevan yang bertangguh, sama ada, kelulusan hak jalan atas permohonan pemilik individu lot yang dipecah bahagi di bawah s. 31(1)(d) Ordinan Tanah (Sabah) (Bab 68) dibaca bersama dengan Kaedah-Kaedah Tanah Negeri atau pengambilan alih tanah-tanah rizab jalan rasmi oleh pihak berkuasa tempatan. Oleh itu, pengeluaran atau pendaftaran dokumen hak milik tidak memberikan responden hak mutlak atau eksklusif untuk berurusan secara bebas dengan tanah rizab jalan yang terkandung dalam PB No: 075540491. Oleh itu, tiada pencerobohan oleh perayu.

(6) Hakim bicara tersalah arah dari segi undang-undang apabila beliau memutuskan pencerobohan oleh perayu terhadap rizab jalan terangkum dalam PB No: 077540491. Perayu jelas mempunyai hak-hak saksama untuk melalui dan ulang alik melalui rizab jalan atau apa-apa bahagian sebagai akses sah ke dan dari jalan utama. Hak ini disahkan, tanpa mengenakan apa-apa syarat berkenaan pembayaran atau sebaliknya oleh Timbalan Pengarah Tanah dan Ukur dalam keputusan yang memberi perayu hak jalan melalui rizab jalan ke jalan utama.

Case(s) referred to:

Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd (Formely Known as Time Engineering Sdn Bhd) [1996] 2 CLJ 561 FC ***(refd)***

Central Spectrum (M) Sdn Bhd v. Sri Ringgit Holding Sdn Bhd [2005] 3 CLJ 341 CA ***(refd)***

Lin Nyuk Chan v. Wong Sz Tsin [1964] 1 LNS 94 FC ***(refd)***

Lye Thean Soo & Ors v. Sykt Warsaw [1990] 2 CLJ 743; [1990] 1 CLJ (Rep) 160 SC ***(dist)***

Ngui Lee Ken & Ors v. Yudah Construction & Engineering Sdn Bhd [2000] 1 LNS 337 HC ***(dist)***

Sabindo Nusantara Sdn Bhd & Anor v. Majlis Perbandaran Tawau & Ors And Another Case [2012] 10 CLJ 773 HC ***(refd)***

Superintendent of Lands and Surveys, Kuching Division & Ors v. Kuching Waterfront Development Sdn Bhd [2009] 6 CLJ 751 CA ***(refd)***

Legislation referred to:

Land Ordinance (Sabah) (Cap 68), ss. 31(1)(d), 59

National Land Code, s. 136

For the appellant - Raymond Szetu (Tiong Jia Yi with him); M/s Szetu & Co

For the respondent - Trevor Maringking; M/s Maringking & Co

[Editor's note: For the High Court judgment, please see Petronas Dagangan Bhd v. Karamunting Development Sdn Bhd [2013] 1 LNS 1458 (overruled).]

Reported by Sandra Gabriel

JUDGMENT

Varghese George JCA:

Introduction

[1] The appellant before us was the plaintiff in an action filed in May 2009 at the High Court Sandakan, for a declaration that they were entitled to the use and enjoyment of the access over a 'road reserve' from their petrol service station to the public highway at Jalan Bokara. The plaintiff also sought an injunction to restrain the respondent (the defendant) from obstructing or preventing the use of the right of way over and along the road reserve and an order to remove any fencing or other obstruction as may be put up by the defendant to deny that right.

[2] The respondent contested the suit and filed in turn a counterclaim seeking, *inter alia*, a declaration that the land within the road reserve was lawfully alienated to them as private property and that the appellant had committed trespass, nuisance and even libel and that the appellant ought to be ordered to pay general and exemplary damages.

[3] The appellant had obtained an interim injunction on 21 May 2009 preventing the respondent from interfering with the appellant's, or their customers' right of access over the road reserve.

[4] When the matter came up for trial, the appellant withdraw its main action against the respondent since, as it would appear, the appellant had on 18 January 2013 obtained from the relevant land office a right of way over part of the road reserve to the petrol service station.

[5] What remained for disposal at the trial was hence only the respondent's counterclaim.

The Judgment Of The High Court

[6] The material part of the judgment of the learned trial judge in respect of which this appeal by the appellant is brought, is reproduced *in extenso* below:

> Since as admitted by PW2 in her oral testimony after being questioned by the Court that up to date there is no change in the land usage, I rule that there is in effect no approved development plan amended or otherwise. All this while the Plaintiff has been operating that petrol station without an approved Development Plan and contrary to Section 59 of the Land Ordinance.
>
> Hence I further rule that the Plaintiff has committed trespass on the Defendant's land without obtaining prior permission of the Defendant's who is the registered land owner. The Plaintiff used the Defendant's land as access to their property, firstly by themselves or by their contractors during the construction and development of the service station and later as a means of access for commercial reasons for their customers and vehicle owners patronising their service petrol station and continued till the Assistant Collector of Land Revenue granted them the right of way under Section 31(1) of the Sabah Land Ordinance.
>
> I refer to the letter at page 10 of the Plaintiff's Bundle of Document dated the 29.07.2004 where in the Defendant gave notice to the Plaintiff that they were surprised that the service station was being erected and that the said land had no road or highway frontage. I hold trespass to run from the date of the said letter till the date of the order of the Assistant Collector of Land Revenue granting the Plaintiff the right of way.
>
> I take note that at page 12 of the same bundle, the Defendant allowed the Plaintiff to construct on a without prejudice basis whilst reserving their legal rights to claim on the encroachment of their lands.
>
> The negotiations and all correspondence related thereto between the Plaintiff and Defendant were all on a without prejudice and I rule so. It is to the Defendant's credit that they initiated and tried to negotiate an out of court settlement but to no avail. They were well aware of their legal rights as the registered owner of the land.
>
> I do not think that the Defendant has acquiesced or abandoned their rights to pursue their claim for trespass.
>
> After listening to the witnesses, going through the documents and hearing counsel's submission I cannot but help to observe the Plaintiff's attitude and cavalier approach in dealing with the dispute with the

A Defendant. It is very obvious to me that there was a complete disregard of the Defendant's rights as the land owner of the road reserve. And these rights are so obvious. The law journals are replete with decided cases.

I must say that the Plaintiff's behaviour amounted to a wanton
B international [sic] interference and a contumelious disregard for the Defendant's right. Defendant therefore is entitled to exemplary damages, see *Ooi York Choo v. Lim Song Foundry* [1963] MLJ 87.

I cannot understand how a huge corporation such as the Plaintiff would act in such a manner. One would have thought that they would properly plan the development, seek competent professional advice of local
C architects or engineers on the local council requirements, seek proper legal advice on the land usage and in particular the Sabah Land Ordinance and liaise with the local authorities and land office.

I allow the Defendant's claim for trespass against the Plaintiff and direct that general and exemplary damages be assessed by the Deputy Registrar
D from the date of trespass i.e. 25th October 2004 till date of Order of the Director of Lands and Surveys dated 18th January 2013 plus interest thereon at 4% per annum till date of full settlement.

I direct the damages also to be assessed by the Deputy Registrar on the interim injunction obtained by the Plaintiff against the Defendant on the
E 21st day of May 2009 which I now set aside, if any.

Getting up cost of RM100,000.00 payable by the Plaintiff to the Defendant with disbursements of RM7,500. This award of cost is reflective on the conduct of the Plaintiffs and the amount of work and expenses incurred in defending and prosecuting their case against the
F Plaintiff's claim.

Background

[7] It was not in serious dispute that prior to the institution of the suit by the appellant in May 2009, there had been certain material antecedent developments. These surrounding matrixes were adverted to by both parties
G during the course of the trial and by the learned trial judge in the judgment. In our assessment too, they formed a relevant backdrop within which context the issues at hand at the trial had to be assessed and determined.

[8] The facts or developments referred above were as follows:

H (a) The respondent owned a parcel of land, in area 149.58 acres, along Karamunting Road in Sandakan held under Town Lease No. 075311821 (the master title).

(b) Some time before 1983, the respondent had applied to subdivide the master title into commercial lots and a 'cinema' lot. The respondent was
I successful and separate titled lots were issued to the respondent namely:

(1) several individual subdivided town leases for the subdivided commercial lots;

(2) a subdivided Town Lease No: 077544186 for the 'cinema lot'; and

(3) a single separate Town Lease No: 077540491 encompassing within it all the road reserves (collectively referred as to 'road reserve') as earmarked to be provided for when the master title was subdivided; this provision for road access to the subdivided lots had been approved by the relevant authority as such as an integral part of the subdivision exercise applied for by the respondent.

(c) Part of the TL No: 077544186 (the 'cinema' subdivided lot) was subsequently acquired by the appellant. (This TL 077544186 was further subdivided into TL No: 07757936 where the petrol service station was sited, and TL No: 077579385 for the remaining portion of the original subdivided TL No: 077544186).

(d) The appellant had some time about 12 September 2002 obtained approval from Sandakan City Council to develop the appellant's part of TL No. 077579376 into a petrol service station with direct ingress and egress to parts of the road reserve contiguous to the perimeters of the said lot.

(e) On 29 July 2004 the respondent wrote to the appellant stating that they were "...puzzled to note that the present site (ex-cinema lot) does not have any road/highway frontage which our land possesses" and expressing an interest "...to enter into further discussions with Petronas to possibly join our land with Petronas and at the same time to become your dealer in managing and operating the above mentioned service station".

(f) The appellant responded on 28 September 2004 stating that: "Based on the approved development plan (from Majlis Perbandaran Sandakan), we are given access from 'Jalan Bokara' into our station. Thus we do not foresee any issue with regards to the need to join our site to any adjacent land". With regard to the respondent's request to be the operator of the station, the appellant stated "...we are unable to attend your request as we have appointed the operator to run the station as soon as the construction is completed".

(g) On 25 October 2004 the respondent wrote to the appellant stating that they would allow the appellant to continue with the construction of the entry and exit roads "...on a without prejudice basis, the said roads whilst reserving our legal rights to claim on the encroachment on our lands".

(h) The appellant completed the service station and access road on 10 November 2004 and was issued with the occupation certificate by the Majlis Perbandaran Sandakan on 25 November 2004. The appellant commenced operations at the service station on 19 July 2005.

(i) The respondent continued to request the appellant for the dealership of a service station and various locations were suggested (Jalan Sulaman near UMS, Kingfisher Park Jalan Likas, Jalan Sim Sim, 7th mile Jalan Labuk, 13th mile Jalan Tuaran and Jalan Lahad Datu-Sandakan).

(j) On 5 October 2006 the respondent informed the appellant that if there was no amicable settlement reached on the dealership of a service station on the sites proposed by the respondent, then:

1. Perjanjian di Karamunting dibatalkan sahaja dan pihak kami berhak untuk tidak memberi kebenaran masuk melalui tanah kami, atau
2. Pihak Petronas membayar sewa bulanan ke atas penggunaan tanah dan jalan, atau
3. Berkongsi keuntungan (profit sharing) dari operasi minyak di Karamunting.

(k) On 15 November 2006, the respondent repeated their demand that unless the respondent was appointed to operate petrol station at two sites proposed by the respondent, they would seek from the appellants' rentals and/or they share the profits from operating the Karamunting Petrol Station.

(l) Subsequently on 28 August 2007, the respondent claimed that the appellant had granted the respondent an option to operate up to four petrol stations in Sabah in return for allowing the access to the Karamunting Petrol Station through the road reserve land. This was promptly denied by the appellant.

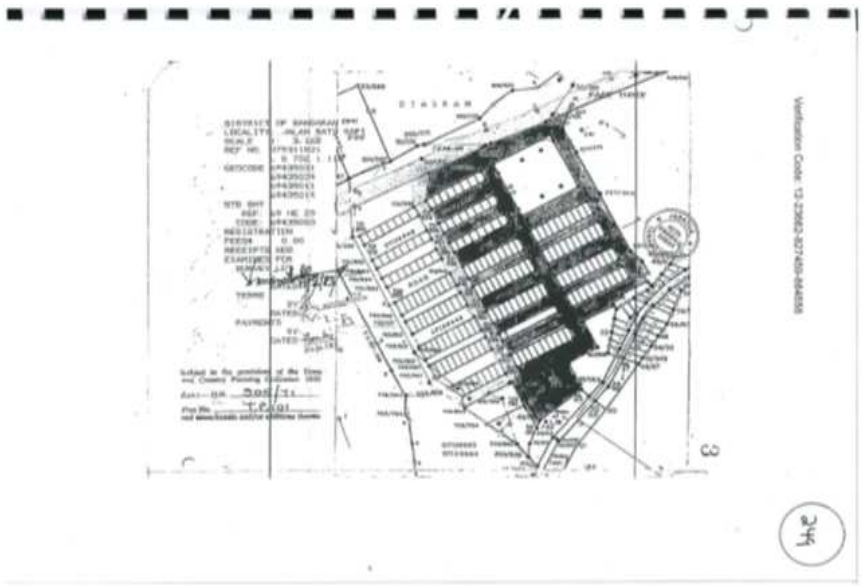
(m) On 20 March 2009, the appellant offered to purchase such part of the road reserve land from the respondent but the price quoted by the respondent was inclusive of the potential 'loss of profits' based on the premise that the respondent should had been granted the dealership over two service station.

(n) The appellant then approached the Director of Lands and Surveys on 3 April 2009 to explore whether such part of the road reserve land could be acquired by the Government and the appellant pay compensation to secure the needful access to the petrol service station. The respondent considered this enquiry by the appellant as being defamatory of the respondent (hence the basis of the alleged defamation claim against the appellant in the counterclaim).

(o) On 13 May 2009, the respondent threatened in writing to fence up all access through the road reserve to the petrol service Station on TL No: 07757936 (part of the cinema lot).

(p) This was the immediate cause which precipitated the subject suit herein, filed by the appellant to obtain the declaration and restraining orders as alluded to earlier in this judgment.

[9] A plan/layout of the relative positions of the contentious subdivided lots within the master title is set out below:



[10] The darkened area show the layout and extent of the 'road reserve' area all encompassed within TL No: 077540491. There was no dispute that this title was issued in the name of the respondent upon subdivision of the master title.

The TL No: 077544186 (the cinema lot), on which the petrol station was constructed, is the clear squarish portion (with the four dots) at the top right corner of the plan/layout. The main road is further to the top after the intervening road reserve land.

The commercial lots, titles of which were individually issued to the respondent as well, are the separate rectangular pieces of land surrounded by the shaded 'road reserve' lands.

Summary Of Appellant's Submission

[11] The principal thrust of the appellant's contention was that there was no trespass committed over the respondent's TL No. 07754091 (the road reserve) or any part of it. The issue of TL No. 07754091 in the name of the respondent encompassing all of the road reserve upon the subdivision of the master title, it was submitted, was merely to vest the right over those area nominally in the name of the respondent, until it was surrendered to the Sandakan City Council after development of those subdivided commercial lots.

[12] It was also argued that the 'road reserve' by its very nature was for the benefit of all the subdivided lots including the owner of TL No: 077544186 and the appellant's further subdivided lot under TL No: 077579376. There was no other road access to the main road for these subdivided lots. The road reserve land reflected in TL No: 07754091 had been created upon the subdivision application made by the respondent themselves of the master title (for commercial development) to provide access to all of the subdivided lots and consequently the respondent must be deemed to have full knowledge that the respondent was not holding for themselves to the area comprised therein in absolute terms but subject to the access rights of the ultimate owners of the subdivided lots (whenever that transpired). In this instant case, such benefit included the rights of the owner or those who had rights or interest in the original 'Cinema Land', including TL No. 077579376, now owned by the appellant.

[13] It was further submitted that the Land Ordinance (Sabah) (Cap 68), unlike the National Land Code and the Land Code (Sarawak) (Cap 81), did not contain provisions that conferred indefeasibility of title in the registered owner of a titled piece of land and this further enabled the court to look behind the registered interest to determine whether any other equitable or other interest or right existed or operated with respect to that area of alienated land comprised in the issued document of title.

Summary Of The Respondent's Submission

[14] The respondent's plea was that in as much as the respondent was the registered owner of TL No. 077540491, it had the absolute right to all of the area of land shown therein (the road reserve) to the exclusion of the others. Following from that, the respondent had the right to fix the consideration for giving or allowing the owners of the subdivided lots, including the appellant, access to the Bokara Highway over the road reserve, ie, the respondent's land.

[15] The respondent maintained that the appellant had since 2002 been trespassers, pure and simple, in that the appellant had not been allowed to traverse, or to even construct the ingress and egress to the road reserve. Further, all the negotiations between the parties (as to dealership in the appellant's petrol stations) in the meanwhile had been without prejudice to and/or subject to such rights (to the road reserve) being reserved by the respondent at all times.

Our Discussion And Decision

[16] The respondent's counterclaim based on a cause of action in defamation brought against the appellant was dismissed by the learned trial judge. There was no appeal against this part of the judgment by the respondent.

[17] The learned trial judge in dealing then with the respondent's claim for trespass, correctly in our view, noted that "What is in contention is the right of the plaintiff (appellant) to use the road reserve". After having stated that, the learned trial judge, however seem to us to have embarked upon a wrong approach to decide whether there had been any 'trespass' in this case as alleged.

[18] An examination of the grounds of the judgment would show that the learned trial judge's focus was whether the appellant had the proper permission or approval to construct the petrol service station on part of TL No: 077544186, and that there ought to have been a change of the usage of land (from cinema to service station) in the first place before such construction was undertaken by the appellant. His Lordship appears to have taken the position that the Majlis Perbandaran Sandakan (who approved the construction of the petrol service station and the ingress and egress to such part of the road reserve) never had authority to do so unless the land comprised in the 'road reserve' under TL No: 077540491 had been first surrendered to that local authority.

[19] The learned trial judge then devoted some 12 paragraphs of the judgment to hold that there ought to have been a change of usage of the land from cinema to petrol station before any construction of the petrol station could take place and upon such failure, s. 59 of the Sabah Land Ordinance had been violated by the appellant. This, as it would appear, seem to have weighed heavily upon the learned trial judge's mind when His Lordship went on to hold that hence there has been a 'trespass' committed by the appellant over the road reserve.

[20] With respect, it was our view that the consideration or question dealt with by the learned trial judge in that manner was wholly irrelevant to the issue at hand before the court. The court was not being called in this case to enquire or decide upon the legality or legitimacy of the construction of the petrol station and/or of the use of the subdivided TL No: 077544186. The issue was a simple and direct one, namely whether the appellant had a right to use part of the road reserve as access to their subdivided lot (and the petrol station constructed on the same).

[21] The conclusion of the court worded such as - "As it now stand, the plaintiff (appellant) has run foul of s. 59 and continue to do so", and "All this while the plaintiff has been operating that petrol station without an approved development plan and contrary to s. 59 of the Land Ordinance", in our assessment, did not address the very question that formed the nub of the issue in this suit – namely, the appellant's right to use part of the road reserve land for access (as had been identified by His Lordship himself as aforestated) to the appellant's petrol station.

[22] In our view too, there were merits in the submissions of counsel for the appellant that the learned trial judge had also misdirected himself on the two authorities that appear to have influenced the court in coming to the conclusion that there had been a 'trespass' committed of the so called respondent's land by the appellant (TL No: 077540491).

[23] *Ngui Lee Ken & Ors v. Yudah Construction & Engineering Sdn Bhd* [2000] 1 LNS 337; [2000] MLJU 262, cited by the learned trial judge was clearly distinguishable on the facts. *Ngui* case was about a defendant who was a stranger who had traversed a 'road reserve already designated and identified' within the boundaries of title deed to the land, without the permission of the registered owner of that land. To be noted was the fact that there, the 'road reserve' was merely marked out on the title, as part of the titled piece of land which included other non-road reserve mass of land.

[24] That was not the situation obtained in this instant case before us. The whole of the 'road reserve' land was comprised in a separate title document which had been entrusted to the respondent by the authorities upon approval of the respondent's application for subdivision into commercial lots for the development of the mass of land held within the original master title. Separate subdivided titles were issued for the other subdivided lots (commercial and cinema).

[25] As also pointed out by counsel for the appellant, the passage quoted by learned trial judge from the Supreme Court decision in *Lye Thean Soo & Ors v. Sykt Warsaw* [1990] 2 CLJ 743; [1990] 1 CLJ (Rep) 160; [1990] 3 MLJ 369, namely, "Until the 'reserve' is taken over by the appropriate authority it is only a road for some future use. Without the consent of the owner a person using the road would be a trespasser", was clearly part of the submission of counsel for the defendant in that case and not the *ratio* or observation of the court on a matter of principle or the law.

[26] The significance of *Lye Thean Soo* case however lay elsewhere. In this case the court recognised that a 'public' right of way could be created by dedication (of the owner) in common law for such use. More interestingly, a closer reading of the case would disclose that upon a subdivision exercise (similar to that in our case) there in that case the result was that a strip of land (or path there) was separately titled as Lot 1277 and the owner had allowed owners of the subdivided lots their rights of access to the main road through this Lot 1277; the registered owner did not deny the subdivided owners of that right of way. But the land owner in question had however refused such access to the general public. The Supreme Court did not agree to the position taken by the owner of the land but held that a public right of way had been created by the use of the path openly by the public for so many years without interruption by the landowner.

[27] To be fair to the learned trial judge in the instant appeal before us, it was nevertheless observed rather obliquely by His Lordship that – "Hence, I further rule that the plaintiff (appellant) has committed trespass on the defendant's (respondent's) land without obtaining prior permission of the defendant's (the respondent's) who is the registered land owner" suggesting that 'permission' should have been obtained by the appellant from the respondent to use the road reserve land as access to the petrol station.

[28] This then brought us to certain crucial questions that were pertinent to determine the issues in actual controversy in this case. They could be listed as follows:

(a) Did the appellant have to obtain the permission or approval of the respondent to use the road reserve or such part of it as was necessary to have access to the appellant's TL No: 07757936 (originally part of TL No: 077544186) to and from the main road;

(b) Notwithstanding that the title to the road reserve (TL No: 077540491), had been issued in the name and held by the respondent, whether such 'ownership' was subject to the rights of the subdivided lot owners (inclusive of the appellant) either on equitable principles or otherwise;

(c) Whether the action of the respondent to obstruct or block the appellant's access through the road reserve land to the petrol service station was justified and whether the imposition of such terms by the respondent here was made *bona fide* for a legitimate purpose.

(d) In all circumstances of the matter, whether the appellant had committed 'trespass' over the said 'road reserve' land.

[29] The starting point in addressing the above question would be an enquiry into what was the legal status of the respondent in being issued with and registered as the 'owner' of TL No: 077540491, namely, the whole of the road reserve land. In *Sabindo Nusantara Sdn Bhd & Anor v. Majlis Perbandaran Tawau & Ors & Another Case* [2012] 10 CLJ 773; [2011] 8 MLJ 653, the High Court observed as follows:

> [15] Unlike the position in Peninsular Malaysia and Sarawak, there is no provision in the Sabah Land Ordinance ('the Land Ordinance') conferring indefeasibility of title or interest in land which is a feature of central importance to the Torrens system of land registration. The concept of land tenure in Sabah is a modified Torrens system of land registration which recognises the concept of bare trust in a vendor/purchase situation: see *Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd* [1996] 2 MLJ 12; [1996] 2 CLJ 561 (FC) per Edgar Joseph Jr FCJ at pp. 576 and 580.

[30] In the *Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd (Formely Known as Time Engineering Sdn Bhd)* [1996] 2 CLJ 561 case cited there, the Federal Court had held that the Sabah Land Ordinance was not modelled on the Torrens system of land registration as it did not have any

provision conferring indefeasibility of title or interest, upon registration of the land comprised in the document of title issued in one's name. The relevant passage from that judgment is set out below:

> With respect, we are unable to agree with Lee Hun Hoe CJ (Borneo) when he said in *Chua Chee Hung* that the Land Ordinance, like the National Land Code, is modelled on the Torrens system. We say so because, unlike the National Land Code, there is no provision in the Land Ordinance conferring indefeasibility of title or interests in land on registration which is a feature of central importance to the Torrens system of land registration.
>
> However, s. 88 which emphasises the paramount importance of registration in accordance with Pt V of the Land Ordinance as a condition precedent for the recognition of the validity of title of dealing or claim to or interest in any land (except land still held under native customary tenure without documentary title) does, in our view, imply the basic Torrens concept that title to or interest in land vests and divests only upon registration. Moreover, the provisions of s. 116 of the Land Ordinance regarding the role of the caveat in giving notice of claim against the registered title point to the same conclusion. We therefore agree with the view of the old Federal Court, speaking through Wylie CJ (Borneo) in *Lin Nyuk Chan*, that the Sabah Land Ordinance (Cap 68) provides for a modified Torrens system of land registration.
>
> It follows, therefore, that the Peninsular Malaysia cases such as *Tai Lee Finance Co Sdn Bhd v. Official Assignee & Ors* [1983] 1 MLJ 81, *Buxton & Anor v. Supreme Finance (M) Bhd* [1992] 2 MLJ 481, *M & F Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 and *Perwira Habib Bank (M) Bhd v. Bank Bumputra (M) Bhd* [1988] 3 MLJ 54, with their emphasis on the indefeasibility of the chargee's registered title guaranteed by s. 340 of the National Land Code subject only to the exceptions of fraud or misrepresentation, or where registration has been obtained by forgery or by means of an insufficient or void instrument or where title or interest has been unlawfully acquired, were of no direct relevance to the issues which arose for decision in the present appeal though, of course, the finance company chargee could derive analogical support therefrom.

[31] A similar position in law that the Sabah Land Ordinance only provided for a modified Torrens system of land registration was also the conclusion reached by the Federal Court in *Lin Nyuk Chan v. Wong Sz Tsin* [1964] 1 LNS 94; [1964] MLJ 200 (as quoted above).

[32] In the light of the above it was our view that the respondent could not assert sole and absolute right to deal with the road reserve land purely on account of the fact that the respondent's name was registered as owner of the TL No: 077540491 for all of the land comprised in the road reserve. The document of title that had been issued to them did not carry with it a meaning that the respondent had exclusive right or interest to all of those land therein to the exclusion of others with the attendant right to impose such conditions or terms as they chose for its use or reuse by others of such area of land comprised therein.

[33] This therefore necessitated further enquiry whether there were others who had a right or interest in the road reserve land. One had to have in mind that under the Sabah Land Ordinance there was no equivalent provision in law as was found in s. 136 of the National Land Code (NLC) where it was statutorily stipulated that the State Director was not to approve any application for subdivision of an alienated land unless certain condition are satisfied, including among them, that the proprietor in such application for subdivision would provide access from the subdivided lots (to be built to designated standards, at that) to a main road. (See: Court of Appeal in *Central Spectrum (M) Sdn Bhd v. Sri Ringgit Holding Sdn Bhd* [2005] 3 CLJ 341 at p. 346; [2005] 5 MLJ 297 at p. 301).

[34] Would then the absence of a statutory provision of similar purport to s. 136 of the NLC mean that the respondent could act 'willy- nilly' and disregard the rights and interest of the owner or owners of the subdivided lots to a proper access to the main road. We should think not. By the very layout of the area comprised in TL No: 077540491 as reproduced above, it was obvious that the road reserve land was carved out to benefit the owners of the subdivided lots, including the appellant, with a proper access or right of way to the nearest main road, the Jalan Bokara. One must also say that the 'road reserve' land area could not be by itself (considering its shape and appendages) be exploited by the respondent for any separate commercial development like the other subdivided lots. The respondent should surely have known that the road reserve land was meant to serve the subdivided lots as access road, as pointed out above.

[35] In our considered view, such rights or interest of the present or contingent owners of the subdivided lots contiguous to the marked out road reserve (TL No: 077540491) amounted to equitable rights and interest which the respondent was obliged to honour without imposition of any payment or other terms and conditions to be complied with by such subdivided lots' owners, as a precondition that is, for the use or reuse of the road reserve land.

[36] It was not in dispute that equitable rights could be imported into and applied in the context of the operations of the Sabah Land Ordinance. This position in law was adequately dealt with by the Federal Court in the *Borneo Housing Mortgage Finance Bhd* case (where the existence of 'bare trustee' situation was favourably accepted by the court to have arisen in) and in *Lin Nyuk Chan* case (where an agreement for a lease was upheld as valid). These cases were decided principally applying equitable grounds. Notwithstanding the statutory provisions of the Sabah Land Ordinance, it was clear that equitable considerations in respect of the determination of rights and administration of matters affecting land was part of the law of the State of Sabah.

[37] We were further fortified in our view that on equitable grounds the appellant had the right of access or right of way to the main road *via* the road reserve land when we further examined the subsequent decision of the Timbalan Pengarah Tanah dan Ukur (Pembangunan) of 18 January 2013 on appeal in Siasatan Tanah Pengarah (Rayuan) No. 20 Tahun 2011. This was the appellant's successful application for right of way to the main road *via* a part of the road reserve. The said decision is reproduced here:

> Keputusan
>
> Oleh itu, saya dengan ini memutuskan bahawa responden haruslah diberikan hak lalu-lalang untuk melintasi tanah perayu tetapi hanya satu lalu-lalang yang boleh diberikan; dan saya putuskan bahawa satu laluan tersebut adalah seperti yang saya tandakan sebagai B dalam pelan di atas kerana laluan tersebut adalah laluan yang terhampir menuju ke jalan Karamunting.
>
> Pemilik-pemilik tanah atau lot yang lain yang berada dalam lingkungan tanah perayu berkebebasan untuk memfailkan permohonan mereka kepada PPHT di bawah s. 31(1)(d) Ordinan Tanah Sabah bagi menyambung laluan ini bagi kegunaan mereka dan menjamin keselesaan mereka pada masa akan datang selaras dengan kaedah No. 11(4) Kaedah-kaedah Tanah.

[38] There are two significant points that can be drawn from this decision of the relevant land authority, namely, the Assistant Director of Land and Survey. They are:

(a) the appellant's and other subdivided owners' right of access to the main road through the road reserve land (comprised in TL No: 077540491) was expressly recognised by the authorities; and

(b) further, and more importantly, the authorities did not impose any condition or terms, such as periodical payments to be made by subdivided landowners to the respondent for the grant to them of access through the road reserve land to the main road.

Also noteworthy here, was the express encouragement by that authority that other similarly placed owners of subdivided lots (from the master title, that is) were entitled to make applications for similar right of way or access through the road reserve to the main road.

[39] We were convinced that in all the circumstances of the matter, the issue of TL No: 077540491 (separately for all of the road reserve resulting from the subdivision of the master title) and the registration of the said title document in the respondent's name was merely a convenient administrative step adopted by the relevant land authority pending either, the approval of right of way upon application by individual owners of the subdivided lots under s. 31(1)(d) of the Sabah Land Ordinance read together with the Land Rules of the State, or the formal taking over of the road reserve lands by the

local authority. As such, the issue or registration of the title document did not vest in the respondent an absolute or exclusive right to deal freely with that road reserve land comprised in TL No: 075540491.

[40] We then asked the question, whether the respondent's conduct and actions, even if the respondent had some 'rights', residual or otherwise, to regulate the use or traverse of the road reserve land by others, were made *bona fide* upon sound or sufficient basis in law. It would be recalled that originally in 2004 the respondent sought to be made a dealer in managing and operating the petrol service station on TL No: 077579376.

Subsequently this evolved into a demand by the respondent for dealership of a service station elsewhere in that locality, and finally for a right to dealership to operate at least two service stations in Sabah. The respondent also sought to factor in the potential 'loss of profits' from operations of two service stations in the 'consideration' suggested by the respondent in response to the offer by the appellant to purchase outright such part of the road reserve as was necessary for the appellant's purpose.

[41] When negotiation on those proposals of the respondent failed and the appellant was not amenable to agree to those demands, the respondent threatened on 13 May 2009 (that is, some four years after the petrol service station was operational) to fence up such part of the road reserve (already used as access with permission of the respondent since 25 October 2004) to deny the appellant the right of access to the main road.

[42] In our assessment, the terms and demands put forward by the respondent had no legitimate foundations and was wholly unreasonable even if the respondent had some rights (yet to be finally determined) over the road reserve. By all appearances, the respondent's action and demand were an opportunistic one to hold the appellant to ransom and derive unfair advantage or benefit. There was no correlation between the demand to be given a dealership of the petrol station and the right to allow access through the road reserve; perhaps a periodical payment imposed for that right of access would have been acceptable at the highest. In the circumstance, such a stance taken by the respondent lacked *bona fides* and no court could condone those demands as validly furthering the respondent's right (if at all).

[43] Could the respondent have imposed a similar demand that the respondent be made a partner or share in the profits or have a stake in any business to be carried out by the purchasers of such of the other subdivided commercial lots bordering the road reserve in return for access to the main road? It would have been totally unreasonable to do so. Hence the demands made on the appellant in exchange for access to the main road, in our assessment, defied any logic and even bordered on the absurd.

[44] If the conduct of any of the parties should have drawn the admonition of the court, it should have been the conduct of the respondent (motivated purely to exploit the situation and seek unjustified benefit for itself), and

definitely not that of the appellant, as found by the learned trial judge. There was no basis to default the appellant as the appellant had permission from the respondent since 2004 to construct, use the access and carry on with the operations of the petrol station, before being faced in 2009 with the threat of a blockade unless the appellant gave in to the respondent's unsupportable demands.

Conclusion

[45] For the reasons addressed and discussed above, we were of the unanimous view that the learned trial judge had misappreciated the facts and the critical question in issue in this suit filed by the appellant, and in the context wherein the respondent's counterclaim for alleged damages for 'trespass' was to be determined.

[46] On the evidence, there was no 'trespass' committed by the appellant. With respect, the learned trial judge had misdirected himself on the law when he held there was 'trespass' by the appellant of the 'road reserve' encompassed within TL No: 077540491. The appellant clearly had equitable rights to pass and repass the road reserve or such part thereof as rightful access to and from the main road. This right had been affirmed, without imposition of any condition as to payment or otherwise, by the Assistant Director of Land and Survey in the decision which granted the appellant the right of way through the road reserve to the main road.

[47] This court was therefore duty bound to intervene where it was shown that the trial court had committed an error in law, misconceived the facts or failed to give sufficient weight to relevant matters and had taken into account irrelevant matters. (*Superintendent of Lands and Surveys, Kuching Division & Ors v. Kuching Waterfront Development Sdn Bhd* [2009] 6 CLJ 751). As elaborated above this appeal before us warranted such intervention.

[48] In the result, we allow the appeal. We set aside all of the orders of the learned trial judge, including costs save and except the order of costs awarded by the High Court to the appellant for the dismissal of the respondent's cause of action in defamation in the sum of RM25,000.

We order that the interim injunction granted to the plaintiff on 21 May 2004 be affirmed in its terms.

[49] As regards costs, having regard to the submissions of the respective counsel both at the trial and before us, we order that the respondent pay the appellant here and below the sum of RM50,000 only in costs (that is separate from the RM25,000 already ordered in favour of the appellant on the dismissal of the respondent's case of action in defamation). The deposit is to be refunded to the appellant.